STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW
HON. LYNDA L. HEATHSCOTT

KIRT BIERLEIN, Conservator for
SAMANTHA C. BIERLEIN, a minor,
and NORMA R. BIERLEIN, as Next Friend
of SAMANTHA C. BIERLEIN, a Minor,

Plaintiffs/Appellants,

v

Michigan Supreme Court Docket No. 128913
Court of Appeals Docket No. 259519
Lower Court Case No. 96-013292-NI

MARK SCHNEIDER and MARY
SCHNEIDER, Jointly and Severally,

Defendants/Appellees.
_____/

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PLAINTIFFS/APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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I. STATEMENT OF BASIS OF JURISDICTION

On June 16, 2005, pursuant to MCR 7.302(B)(5), Plaintiffs-Appellants Kirt Bierlein, Conservator for Samantha C. Bierlein, a minor, and Norma R. Bierlein, Next Friend of Samantha C. Bierlein, a minor, filed with this Honorable Court its application for leave to appeal the May 12, 2005, Order of the Michigan Court of Appeals denying Plaintiffs-Appellants' application for leave to appeal the November 15, 2004, Saginaw County Circuit Court Order Reinstating Dismissal and Denying Plaintiffs' Motion for Enforcement of Settlement.

On December 28, 2005, this Court ordered oral arguments on the issue of whether to grant the application or take other peremptory action pursuant to MCR 7.302(G)(1). Oral arguments were heard on April 4, 2006, and on April 14, 2006, this Court granted Plaintiffs-Appellants' application for leave to appeal pursuant to MCR 7.302(G)(1).

II. ISSUE PRESENTED ON APPEAL

WHETHER THE CIRCUIT COURT ERRED IN DENYING THE PLAINTIFFS' MOTION TO ENFORCE THE SETTLEMENT ON BEHALF OF A MINOR CHILD WHEN THE ORIGINAL SETTLEMENT WAS NOT CONCLUDED IN CONFORMITY WITH MICHIGAN COURT RULE 2.420?

Plaintiffs/Appellants answer this question "Yes."

Defendants/Appellees answer this question "No."

III. STATEMENT OF FACTS

This appeal involves a personal injury action which was first filed in May 1995 to recover for head injuries which were sustained by an infant child, Samantha C. Bierlein, as the result of an automobile accident. Suit was filed by her mother, Norma Bierlein, as Next Friend. A settlement of the case was ultimately reached in the amount of $55,000.00. (Appendix, hereafter "A",17a) The settlement check was made payable to the Next Friend and to the Plaintiff's original attorney, Patrick Collison. No conservator was appointed prior to entry of the Order of Dismissal by the circuit court. Plaintiff's counsel took charge of the settlement proceeds, assured the Next Friend that they were being safely kept for the minor child, and ultimately used the funds for his own purposes. (A, 67a, 72a) (Attorney Collison has since been sentenced in a separate criminal proceeding and is serving a prison term.)

During the original settlement hearing which took place in July 1997, Judge Patrick Meter, then Circuit Judge, inquired whether a conservator had been appointed to receive the settlement proceeds. (A, 14a) MCR 2.420, then as now, required appointment of a conservator and posting of a bond prior to dismissal of the civil action. After finding that the settlement was fair, Judge Meter noted: "And I take it a conservator has been appointed." (Id.) Attorney Collison responded that "there will be one very shortly." (Id.) The court then signed the order dismissing the case, despite the requirements set forth in MCR 2.420(B)(4)(a).

No conservator was appointed, and no bond was posted. The Order of Dismissal which had been prepared by the Defendant's counsel did not even require appointment of a conservator. The order simply approved the settlement and dismissed the case. (A, 17a-18a)

In April 2001, Plaintiff's mother, Norma Bierlein, brought to the attention of the Circuit Court that she had called attorney Collison's office on multiple occasions, requesting copies of

documents which showed where the settlement funds had been invested. (A, 20a) "I have no copies of anything, no information on where the money is, who is handling the money, …" (Id.) Attorney Collison, who was present at the hearing, represented to the court as follows:

> "The money had – there was a – I – when we settled the case, I told Norma and Kirt [the Plaintiff's father] that the money had to be deposited into a restricted account. There was a firm that I had used in the past where they took care of getting the people appointed conservator, and the money was – that's my recollection. It's been four years ago. . . .
>
> … and I just assumed that this – they were getting statements all along. I didn't know anything about it, your honor, until – I was on vacation two weeks ago, and when this issue arose that there was an issue as to the settlement funds. So I don't have anything to add to the court until I can make some phone calls or . . .
>
> The Court: What was the name of the firm that got the money?
>
> Mr. Collison: Judge, I can't tell you that off – I just don't know the name of the person. It wasn't a law firm. They – it was some type of an investment firm, and they used people to set up a conservatorship." (A, 22a-23a)

The show cause hearing ended with the court ordering the parties and counsel to reappear on the following Monday. (A, 26a-27a)

When the court reconvened, Mrs. Bierlein indicated that she had never received any of the settlement proceeds (A, 33a), and that while she remembered signing settlement papers, she did not remember endorsing the settlement check. (A, 35a)

Attorney Collison, on his part, represented to the court that the settlement funds had been deposited with NBD Bank (f/k/a "Bank One", n/k/a "Chase"), and that he was attempting to determine where the settlement funds were now located. (A, 35a-36a) On May 10, 2001, Circuit Judge Fred L. Borchard, determining that the case had been improperly dismissed on July 28, 1997, ordered that the case be reopened, Nunc Pro Tunc. (A, 49a) He then appointed a

Guardian Ad Litem on May 17, 2001, to prepare a report regarding the whereabouts of the settlement proceeds. (A, 52a-53a)

On June 6, 2001, the court held another Show Cause hearing after the court was notified that attorney Collison had attempted suicide by driving his motor vehicle into a tree at a high rate of speed. (A, 66a) Judge Borchard observed the following:

> "The Court understands there is an ongoing criminal investigation by the Michigan State Police. I believe there has been grievances filed in this matter. I should say "in matters," not necessarily this matter, in regards to whether or not one has been filed in regards to this particular case.
>
> The Court in this matter has set aside the Order of Dismissal by an order dated May 10, [2001]in that the - - based on the complaint and the review by the Court concerning non-payment of funds, **the Court has determined that this matter was improperly dismissed in July of 1997. The matter is, therefore, reinstated. The Court does not consider this matter dismissed.**
>
> The Court record also reflects there is **no order distributing funds or approving the breakdown of the funds** that had been commented on at the settlement hearing before Judge Meter."
> (A, 67a) (Emphasis supplied).

On October 17, 2001, Kirt Bierlein, the father of the minor child, was appointed as Conservator and added as a party of Plaintiff. Mr. Bierlein, the Plaintiff-Conservator and Appellant herein, then filed a Motion to reopen the proceedings and to evaluate the July 28, 1997 settlement terms. (A, 102a-104a) In the alternative, Plaintiffs requested that if the court determined that the settlement was proper, that it enforce the settlement. The motion to reopen the settlement proceedings was granted by the Circuit Court on June 21, 2002. (A, 130a-134a) The alternative request to enforce the settlement was, therefore, not addressed.

Defendants appealed by leave to the Court of Appeals, which was granted on October 25, 2002. The issue before the Court of Appeals on Defendants' Leave to Appeal was whether the

Circuit Court could vacate the July 28, 1997 Order of Dismissal under MCR 2.612(C)(1) and its subsections, and review the settlement terms to determine whether it was a fair settlement. In the Court of Appeals' decision of January 20, 2004, it held that the trial court erred in setting aside the settlement because the requirements of MCR 2.612(C)(1) were not met. No decision was made regarding the enforcement of the settlement in view of the failure to follow MCR 2.420. (A, 135a-137a)

Following the Court of Appeals' January 20, 2004 Decision and Order Remanding to the Circuit Court, Defendants filed their Motion for Entry of Order in Conformity with the Court of Appeals' Decision reinstating dismissal. (A, 138a-139a) Plaintiffs filed their response to the motion for entry of order reinstating dismissal and also renewed their motion to enforce settlement. (A, 141a-145a).

On October 25, 2004, Circuit Judge Lynda Heathscott, to whom the case had been reassigned, denied the Plaintiffs' Motion for Enforcement of the Settlement and reinstated dismissal of the case pursuant to the Court of Appeals opinion of January 20, 2004 (Order Reinstating Dismissal, November 15, 2004). (A, 146a-147a).

Although no opinion was issued by the Circuit Court, Judge Heathscott, in denying the Plaintiffs' Motion for Enforcement of the Settlement, made reference to a portion of the Court of Appeals Opinion of January 20, 2004, where it was stated:

> "Although Plaintiff's original attorney appears to have absconded with Samantha's share of the money, through no fault of Plaintiff, there are other options available to recover the money. The settlement here was on the record, the judge approved it, and the Next Friend agreed to the amount**. Plaintiff was aware at that time that a conservator had not been appointed, and yet she still agreed to the settlement**." (Emphasis supplied) (A,137a)

On December 2, 2004, Plaintiffs-Appellants filed their application for leave to appeal the

Circuit Court's Order Reinstating Dismissal and Denying Plaintiffs' Motion for Enforcement of the Settlement with the Court of Appeals. Leave was denied on May 12, 2005. (A, 148a) Subsequently, on June 16, 2005, Plaintiffs-Appellants filed their application for leave to appeal the Court of Appeals' May 12, 2005 Order denying leave to appeal with this Court. On December 28, 2005, this Court ordered oral arguments to be heard on the issue whether it should grant the application or take other peremptory action. Oral arguments were heard by the Court on April 6, 2006, and leave to appeal was granted on April 14, 2006.

IV. LAW AND ARGUMENT

THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' MOTION TO ENFORCE THE SETTLEMENT WHICH HAD BEEN PREVIOUSLY APPROVED BY THE CIRCUIT COURT ON JULY 28, 1997

A. Standard of Review

A trial court's decision on a motion to enforce settlement is reviewed under the clear procedural requirements which are provided in MCR 2.420, settlements and judgment for minors and legally incapacitated individuals.

B. Law and Argument

In this Court's December 25, 2005 Order, the parties were directed to brief three issues:

1. Whether the circuit court had subject matter jurisdiction to approve the settlement and to enter an order of dismissal;

2. Whether any other reason justifies relief from the order of dismissal;

3. Whether the order of dismissal ought to be set aside in the exercise of this Court's inherent power to enforce its own rules pursuant to MCR 7.316(A)(7).

These issues are separately addressed below. However, resolution of these issues first

requires analysis of the basic underlying issue of whether the 1997 settlement proceedings were proper.

1. THE SETTLEMENT PROCEEDING CONDUCTED IN JULY 1997 FAILED TO COMPLY WITH THE BASIC REQUIREMENTS OF MCR 2.420.

Although the Michigan Court Rules do not provide specific guidance for correcting a procedural error such as the Circuit Court made in entering the July 28, 1997 order of dismissal, it is submitted that the overriding principles behind the Michigan Court Rules require reversal of that portion of the Circuit Court's November 15, 2004 Order which denied enforcement of the July 28, 1997 Settlement.

The Michigan Court Rules begin with the general caveat that:

> "These rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties."

(MCR 1.105.) In applying each court rule, courts are duty bound to ensure that these principles are carried out. With respect to minors, a universally protected class, there is a specific Michigan Court Rule – MCR 2.420 – dedicated to carry out the principles outlined in MCR 1.105. MCR 2.420 provides:

> (A) Applicability. This rule governs the procedure to be followed for the entry of a consent judgment, a settlement, or a dismissal pursuant to settlement in an action brought for a minor or a legally incapacitated individual by a next friend, guardian, or conservator or where a minor or a legally incapacitated individual is to receive a distribution from a wrongful death claim. Before an action is commenced, the settlement of a claim on behalf of a minor or a legally incapacitated individual is governed by the Estates and Protected Individuals Code.
>
> (B) Procedure. In actions covered by this rule, a proposed consent judgment, settlement, or dismissal pursuant to settlement must be brought before the judge to whom the action is assigned and the judge shall pass on the fairness of the proposal.

(1) …
(2) …

(3) If the next friend, guardian or conservator for the minor or legally incapacitated individual has been appointed by a probate court, the terms of the proposed settlement or judgment may be approved by the court in which the action is pending upon a finding that the payment arrangement is in the best interests of the minor or legally incapacitated individual, but no judgment or dismissal may enter until the court receives written verification from the probate court that it has passed on the sufficiency of the bond and the bond, if any, has been filed with the probate court.

(4) The following provisions apply to settlements for minors.

(a) If the settlement or judgment requires payment of more than $5,000 to the minor either immediately, or if the settlement or judgment is payable in installments in any single year during minority, **a conservator must be appointed by the probate court before the entry of the judgment or dismissal.**

(b) If the settlement or judgment does not require payment of more than $5,000 to the minor in any single year, the money may be paid in accordance with the provisions of MCL 700.5102.

(5) ….

(MCR 2.420, emphasis supplied.)

With respect to settlements for infant children, judges and litigants are not left to fashion the "just, speedy, and economical determination" of the action. Instead, this Court, through the Michigan Court Rules, has carefully crafted a procedure whose sole purpose is to ensure that the settlement for an infant child is fair, securely set aside and protected for the child's future needs.

The court rules do not place the onus on mothers or fathers to know whether or not the required settlement procedures have been followed. It is the Court's responsibility to ensure that the procedures have been followed. Circuit Judge Heathscott was clearly incorrect in concluding otherwise.

This Court has long recognized that it is the "special duty and province [of the courts] to

look after the interests of minors." Moebius v McCracken, 261 Mich 409, 418; 246 NW 163, 166 (1933). As this Court stated in Great Lakes Realty Corp. v Peters, 336 Mich 325; 57 NW2d 901 (1953):

> "Incompetent persons are protected by our law because they are deemed to be unaware of the realities of life and unable to sense the significance of these things which may affect them. In the true sense they have no control over their acts because they are unable to comprehend them. Such a person, faced with litigation or, in this case, with a judgment forfeiting a home, **should be given all of the protection that the law affords."** (336 Mich 325 at 333.) (Emphasis supplied)

Although the issue has never been squarely decided by this Court, the question of whether a probate estate must be opened in order to receive a settlement in excess of $5,000 has been discussed in Michigan appellate decisions. For example, in In Re Contempt of Auto Club Ins. Ass'n., 243 Mich App 697; 624 NW2d 443 (2001), the Michigan Court of Appeals, in considering whether the circuit court had abused its contempt powers when the defendant Automobile Club refused to issue a settlement check until a probate estate had been opened, observed as follows:

> "On appeal, Goudy and ACIA insist that Algarawi had to open a probate estate to receive a settlement of this size. If we were forced to decide this issue – and we are not – **we would be inclined to agree that the plain language of MCR 2.420(4)(a) required her to open a probate estate."** (243 Mich App 697 at 701.) (Emphasis supplied)

In addition to citing MCR 2.420 and MCLA §700.403 (now MCLA §700.5102), the Court of Appeals also cited Smith v YMCA of Benton Harbor, 216 Mich App 552; 550 NW2d 262 (1996). In that case, the appellate court was asked to determine whether a parent could compromise a minor child's claim outside of the provisions of MCR 2.420. In ruling that a parent could not compromise a minor child's claim without following the clear dictates of the court rule and statute, the Court of Appeals stated as follows:

> "The obvious basis for such a rule is to ensure that the best interests of the minor are protected by (1) the appointment of a Next Friend, Guardian, or Conservator to represent the minor and (2) the oversight of the trial court, or probate court, before an action is commenced, to scrutinize any proposal that compromises the minor's rights."

(216 Mich App 552 at 556.)

In cases where a civil action has not yet been filed, the Michigan appellate decisions have also ruled that the provisions of MCLA §700.403 (now MCLA §700.5102) must be strictly followed. Commire v Automobile Club of Michigan, 183 Mich App 299; 454 NW2d 248 (1990).

The cases which have addressed minor children's settlements have followed a consistent theme regarding the enforceability of settlement agreements based on their compliance with applicable court rules. In Bowden v Hutzel Hospital, 252 Mich App 566; 652 NW2d 529 (2002), the Court of Appeals observed the following:

> "Although contract principles govern settlement agreements, **a settlement agreement is not enforceable if it does not also satisfy the requirements of any relevant court rule.**

(252 Mich App 566 at 571.) (Emphasis supplied)

The court went on to rule that:

> "Recognizing that a parent has no authority to compromise an unliquidated claim or to liquidate a claim on behalf of a child absent the formal procedures and proper supervision suggested by the court rule, it is self-evident that MCR 2.420 seeks to protect an interested minor child's rights in settlement of a claim. Smith v YMCA of Benton Harbor/St. Joseph, 216 Mich App 552, 556; 550 NW2d 262 (1996) (emphasis omitted). With that fundamental purpose in mind, the procedures outlined in subsection B are thus designed to maintain the integrity of the process through which guardians and other individuals work toward settling claims on a minor's behalf in a manner commensurate with the minor's best interest." (252 Mich App 566 at 572.)

In the present case, the Circuit Judge in the July 1997 settlement hearing did pass on the

fairness of the settlement. That issue is now at rest. The Court also inquired as to whether a conservator had been appointed. That inquiry was also required under MCR 2.420. But the Court did not go far enough. MCR 2.420(B)(3) requires that the case cannot be dismissed "until the court receives written verification from the probate court that it has passed on the sufficiency of the bond" of the conservator, and that the bond has been filed with the court. Furthermore, MCR 2.420(B)(4)(a) provides that "a conservator must be appointed by the probate court before entry of the judgment or dismissal." Accordingly, the settlement amount cannot be paid until a conservator has been appointed. (MCR 2.420(B)(4)(a)) These are requirements, not suggestions.[1]

Other courts which have considered this issue have uniformly ruled in favor of the infant child. *See, eg,* Iverson v Scholl, 136 IllApp3d 962; 483 NE2d 893 (1985); Valdimer v Mount Vernon Hebrew Camps, Inc., 9 NY2d 21; 172 NE2d 283; 210 NYS2d 250 (1961) ("If we give recognition to the indemnity provision, the child will be penalized for her father's indiscretion: the very situation our public policy seeks to avert." (Id. at 27); Montgomery v Erie R. Co, 97 F2d 289 (3d Cir 1938) ("these sections [of the Orphans Court Act] provide a method for the payment and discharge of obligations due to minors to the end that the minor may be assured of an honest administration of his funds during his minority. Minors are wards of the court and their rights must be guarded jealously." (97 F2d 289 at 292.)

If Michigan courts desire to protect minors' rights in litigation, both the fairness of the settlement and the security of the settlement must be supervised by the courts. In this case, the Circuit Court, with the participation of counsel for the plaintiff and defendants, allowed attorney Collision the opportunity to defraud the minor child. That error cannot go uncorrected. Nor can

[1] The requirements of MCR 2.420 (B) (3) cannot be satisfied by paying the settlement to a parent. Payment to the parent of a minor (MCLA § 700.403, now MCLA § 700.5102) is only allowed in situations where the amount of the settlement is less than $5,000.00. Settlements over that amount must be paid to the conservator.

that error be attributed to the minor child's mother. The minor child, through her conservator, is entitled under MCR 2.420 to require that the settlement be properly paid as a condition of dismissing the civil action.

The situation confronting this Court in the present matter cannot be brushed aside as another unfortunate situation where "bad facts lead to bad law." The facts in this case present the very situation which the drafters of MCR 2.420 sought to protect against. Strict adherence to the rule by both courts and litigants is essential. *Cf*. In Re Certified Question from the United States Court of Appeals for the Ninth Circuit, (Veliz v Cintas Corp.), 474 Mich 1228, 1229; 711 NW2d 752, 753 (2006) (**"We hold parties over whom we actually do have jurisdiction to meticulous compliance with our rules."**) (Emphasis supplied.)

2. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION WHEN IT ENTERED THE ORDER OF DISMISSAL WITHOUT THE PRIOR APPOINTMENT OF A CONSERVATER AND THE APPROVAL OF A BOND.

MCR 2.612 (C)(1)(d) provides that a party may be relieved of a final judgment, order or proceeding if the judgment or order is void. Unlike other grounds for relief from a judgment or order, a motion under subsection (d) may be raised at any time.

At the July 27, 1997, in camera hearing, Defendant's counsel stated that the purpose of the hearing was to facilitate a settlement of two cases which arose out of the same automobile collision. Norma Bierlein, the next friend appointed for her minor daughter, Samantha, gave testimony regarding Samantha's injuries, treatment and present condition. This testimony was required under the procedure set forth in MCR 2.420. After hearing the testimony, the court questioned the next friend regarding the minor child's physical condition.

The court then concluded that "the amount of the settlement in the gross amount of

$55,000.00 is fair, just and reasonable." (A, 13a) After the court determined the net distribution to the minor child, the court continued: "and I take it a conservator has been appointed." (A, 14a) At this critical juncture of the proceedings, the court received the following response from Attorney Collison: "there will be one very shortly." (Id.) Having received something other than an unequivocal "yes" response and evidence that the appointment had in fact been made and bond determined, the Circuit Court had no power to act pursuant to the basic requirements of MCR 2.420. Judge Meter could take no further action with respect to the order of dismissal which the Defendant's attorney handed to him for entry. By executing the order of dismissal, the Circuit Court effectively determined that no conservator was required and no bond needed to be posted. This, however, was beyond the jurisdiction of the Circuit Court and was exclusively a matter for the probate court to consider (MCR 2.420 (B)(4)). Lacking subject matter jurisdiction over the issue of the appointment of conservator; who would be appointed; the conditions of the conservatorship and the amount of bond, if any, which would need to be posted, the court did not have the authority to complete the settlement process and could not dismiss the case as it did.

Although circuit courts are vested with broad subject matter jurisdiction (Const 1963, Art 6 §13), the Michigan Constitution has vested exclusive jurisdiction in the probate court for matters pertaining to the property interests of infant children. Const 1963, Art 6§ 15.

Michigan statutes likewise reserve jurisdiction over minor children to the probate court. MCL § 700.1302(c). Under these general provisions, the circuit court has historically exercised very limited power regarding the affairs of a minor.[2]

[2] MCR 2.420, first effective in 1985, presented a change in prior practice. Prior to 1985, all aspects of a minor's settlement were handled by the probate court, including the decision as to the reasonableness of the settlement. After 1985, authority as to the question of "reasonableness" was given to the circuit court which presided over the case, on the belief that the trial judge would have greater familiarity with the injury and could best pass judgment on it for the minor's protection. Pursuant to comments to MCR 2.420, the rule creates procedures for the approval of a consent judgment or dismissal pursuant to a settlement action brought on behalf of a minor.

Unlike other issues, subject matter jurisdiction may be raised at any time in a proceeding. The court on its own initiative may raise the issue. Once the court determines that it lacks subject matter jurisdiction, the court cannot act, even if the parties consent to the jurisdiction. Warner v Noble, 286 Mich 654; 282 NW 855 (1938).

This Court has not addressed the issue of subject matter jurisdiction in the context of the circumstances present in this case. The subject matter jurisdiction analysis which this Court announced in Bowie v Arder, 441 Mich 23; 490 NW2d 568 (1992), is not dispositive of the issue presented here. This is not merely a case where the court has jurisdiction over the subject matter and errs in the exercise of that jurisdiction. Rather, it is a case where competing jurisdiction of two courts – the circuit court and probate court – must be respected.

The Restatement of Judgments, Second, on which this Court has previously relied upon for guidance[3] provides the following rules regarding subject matter jurisdiction:

> "When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:
>
> (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
>
> (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
>
> (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction."

(Restatement (Second) of Judgments §12.)

As this Court noted in Bowie v Arder, supra:

[3] *See, eg*, Pierson Sand & Gravel, Inc. v Keeler Brass Co., 460 Mich 372; 596 NW2d 153 (1999); Monat v State Farm Ins Co, 469 Mich 679; 677 NW2d 843 (2004).

> "We did not believe that the circuit courts of Michigan sitting in chancery retain for all purposes the broad jurisdiction over children formerly exercised by the chancery courts."… for example, while the English chancery courts through their parens patriae power could appoint or remove a guardian of a child, MCL Section 700.21(c) provides that guardianship proceedings are exclusively within the jurisdiction of the probate court."

(441 Mich 23 at 50-51.)

Under the Restatement (Second) of Judgments, Section 12(2), a decision by the circuit court which infringes upon the authority of the probate court to establish a conservatorship and surety bond for the protection of the minor child would be subject to collateral challenge. The rule laid down in the Restatement Section 12 has been discussed by several appellate courts. *See* Kalb v Feuerstein, 308 US 433; 60 S Ct 343 (1940) (state court looses subject matter jurisdiction to foreclose on real estate mortgage after bankruptcy petition is filed by the debtor); Christopher Village v United States, 360 F 3d 1319 (Fed Cir. 2004) (while U.S. district court had jurisdiction over action to enjoin mortgage foreclosure; subject matter jurisdiction did not exist when property was foreclosed by Department of Housing and Urban Development); Brown v Wonders, 98 Wash2d 46, 653 P2d 602 (1982) (subject matter jurisdiction is not subject to collateral challenge based upon a subsequent decision by the United States Supreme Court.)

In the present case, entry of the order of dismissal circumvented and infringed upon the authority of the probate court to establish a conservatorship for the minor child and to set bond for the protection of the child. In addition, entry of the order violated Section 12(3) of the Restatement (Second) of Judgments. At the time of entry, the Circuit Court presumably relied upon the representation of Plaintiff's counsel that appointment of the conservator was in process - Plaintiff's counsel would be true to his word and would, in fact, proceed with the conservatorship appointment. Entry of the order of dismissal without actually seeing the order appointing a conservator and establishing bond for the protection of the minor child, resulted in

an act of the Circuit Court (entry of the Order of Dismissal) based upon inadequate information which was critical to such action.

In this case, the Circuit Court's lack of subject matter jurisdiction to enter the order of dismissal, as opposed to considering the fairness of the settlement, is not a mere technicality. As was previously noted, the condition precedent for entry of an order of dismissal could only be satisfied if the parties proceeded, as required under MCR 2.420, to the probate court for appointment of a conservator and posting of a bond. Having failed to take this critical step, the Circuit Court could take no further action as to the proposed settlement, and in particular, it could not dismiss the action.

Because the Circuit Court lacked jurisdiction to appoint a conservator or to approve a bond, no further proceedings were permitted in the Circuit Court. The Defendant's tender of a proposed order of dismissal, together with a check made payable to the next friend and the Plaintiff's attorney, was premature and beyond the jurisdiction of the court to consider. Only after the probate court had completed its proceedings for appointment of conservator and determination of sufficient bond could the Circuit Court dismiss the case. Without the prior appointment of a conservator, the Circuit Court was without authority, or subject matter jurisdiction, to enter the Defendant's proposed order.[4]

3. BECAUSE THE PAYMENT OF FUNDS TO A NEXT FRIEND DOES NOT CONSTITUTE SATISFACTION OF THE SETTLEMENT WHICH WAS APPROVED BY THE CIRCUIT COURT, THE ORDER OF DISMISSAL IS SUBJECT TO BEING SET ASIDE UNDER MCR 2.612(C)(1)(F).

Michigan appellate courts have identified three requirements which are to be met

[4] As an aside, by 1997 – 12 years after adoption of the new settlement procedure – this requirement was well understood by the automobile insurers in Michigan and their regular trial counsel.

in order to obtain relief from a judgment or order under MCR 2.612(C)(1)(f). They are:

> (1) The reason for setting aside the judgment must not fall under sub-rules (1) through (5);
>
> (2) The substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside and
>
> (3) Extraordinary circumstances must exist which mandate setting aside the judgment in order to achieve justice.

Altman v Nelson, 197 Mich App 467, 495 NW2d 826 (1992); McNeil v Caro Community Hosp, 167 Mich App 492, 497; 423 NW2d 241 (1988).

In applying the above court rule, Michigan appellate courts have cautioned against a "standard which would force a trial court to engage in frustrating semantic exercises to bring its particular case, which is crying for relief, within the purview of an inflexibly phrased rule." Heugel v Heugel, 237 Mich App 471, 479; 603 NW2d 121 (1999), quoting Kaleal v Kaleal, 73 Mich App 181; 250 NW2d 799 (1977).

In the present case, when the Circuit Court determined that the settlement was fair and reasonable and in the interests of the minor child, Defendant's counsel delivered a release and settlement draft to the Plaintiff's attorney. The check was made payable to "Norma Bierlein, next friend and Patrick Collison," the Plaintiff's attorney. As noted above, Plaintiff does not question the authority of the Circuit Court to consider whether the settlement was in the best interests of the minor child. MCR 2.420 provides the circuit court's authority in this respect.

However, the fact that the settlement amount was approved by the court on the testimony of the next friend did not authorize the Defendant to pay settlement funds to the next friend. Pursuant to court rule and statute, only a conservator, appointed by the probate court, could receive funds that were to be paid as consideration for the settlement and release of a minor's

claim.

MCR 2.201 provides for the appointment of a next friend. Although a conservator may bring an action on behalf of a minor child (MCR 2.201(E)), the circuit court is also authorized to "appoint a 'competent and responsible person' to appear as next friend on his or her behalf." MCR 2.201(E)(1)(b). The authority of the next friend, however, is limited. Although the next friend may prosecute the action through appeal, the next friend "may not receive money or property, unless he or she gives security as the court directs." (MCR 2.201(E)(3).)

In the present case, however, the Circuit Court did not reference MCR 2.201 and did not in any way authorize or direct the funds to be delivered to the next friend. To the contrary, the court made specific reference to the appointment of a conservator, which Plaintiff's counsel assured would be completed shortly.

The issue of improper payment of a settlement to a next friend has not been raised in this Court. The only reported case that could be found which has considered the issue, however, held that such payment would not support the satisfaction of a judgment. In Montgomery v Erie R. Co, 97 F2d 289 (3d Cir 1938), the United States Court of Appeals for the Third Circuit, applying New Jersey law, held that because New Jersey law did not authorize a next friend of a minor to "do more than prosecute to judgment or defend a suit to which the minor is a party," payment to the next friend would not support satisfaction of a judgment. After reviewing the New Jersey statutes pertaining to minors, the court stated as follows:

> "These sections provide a method for the payment and discharge of obligations due to minors to the end that **the minor may be assured of an honest administration of his funds during his minority. Minors are wards of the court and their rights must be guarded jealously."** 97 F2d 289 at 292 (Emphasis supplied)

Nor would the Montgomery Court accept the Defendant's argument that payment to the

Plaintiff's attorney would constitute satisfaction: "We can see no reason for assuming that the authority of the attorney of record can rise higher than that of the next friend who engaged his services. No authority has been cited to us which supports such a proposition. In fact authority seems otherwise." Id.[5]

Almost 70 years have transpired since the Third Circuit's decision in Montgomery v Erie R. Co, *supra*. During those years, the Michigan Court Rules and statutes pertaining to minor settlements, which are similar in purpose to the New Jersey statute, have undergone several revisions. However, when the 1997 settlement was approved in the present case and the order of dismissal was entered, the rules which governed a minor's settlement were well established and directed at achieving a single purpose – to protect the obligations due to minors so that they may be assured of an honest administration of their funds during minority. Having failed in this respect, the order dismissing the case must be set aside until such time as the Defendants pay the agreed-upon settlement to the minor child's conservator.

Application of MCR 2.612 must be made in the context of the requirements of MCR 2.420. In interpreting and applying the court rules, it is important to keep in mind that this Court's rules are subject to the same construction and application as this Court has established for statutes. Frank v William A. Kibbe & Associates, 208 Mich App 346; 527 NW2d 82 (1995). As with statutes, "when called upon to interpret and apply a court rule, courts should apply the principles that govern statutory interpretation." Haliw v City of Sterling Heights, 471 Mich 700; 691 NW2d 753 (2005). Accordingly, "courts should begin with the language of the rule." Id. "The court should presume that every word has meaning and [should] avoid a construction which would render a statute, or any part of it, surplusage or nugatory." Altman v Meridian Township,

[5] Interestingly, the Montgomery Court refused to even deduct from the judgment the amount which the Plaintiff would otherwise have been required to pay to the Plaintiff's attorney as a fee. Instead, the court left this issue to the discretion of the trial court on remand.

439 Mich 623, 635; 487 NW2d 155 (1992), reh den 440 Mich 1204 (1992). Unless it is determined (and it cannot be) that all procedural requirements mandated by MCR 2.420 have been met, the 1997 order of dismissal cannot stand. Plaintiff-Appellant Kirt Bierlein, as the newly appointed conservator for his daughter, is entitled to require enforcement of the settlement, with interest from the date of settlement.

This case presents the perfect situation for applying the provisions of MCR 2.612(C)(1)(f). The interests of justice are not fulfilled if the rights of a minor child are at risk. Moebius v McCracken, 261 Mich 409; 246 NW 163 (1933). *See also* Guastello v Citizens Mutual Ins Co, 11 Mich App 120; 160 NW2d 725 (1968) ("The rules and practice of the court being established by the court, may be made to yield to circumstances to promote the ends of justice." Id. 138).

Defendants have argued that the requirements for application of subsection (f) have not been met because the defendants would be detrimentally affected if the judgment is set aside. While this argument is inviting, it has been soundly rejected by those courts which have considered the argument in a similar context as presented in this case.[6]

This Court has long recognized that where an improper payment is made for, or on behalf of, an infant, the party which made the improper payment has the right to proceed to collect those funds from the party which received them. Dudex v Sterling Brick Co, 237 Mich 470; 212 NW 92 (1927). Other courts have similarly held in favor of the infant child. *See, eg,* Montgomery v Erie R. Co, 97 F 2d 289 (3d Cir 1938); Iverson v Scholl, 136 IllApp3d 962; 483 NE2d 893 (1985); Valdimer v Mount Vernon Hebrew Camps, Inc, 9 NY2d 21; 172 NE2d 283 (1961). As the court noted in Colfer v Royal Globe Insurance Co, 214 NJ Super. 374, 519 A2d

[6] Proceedings involving settlements of civil actions on behalf of a minor are the province of both parties. And a party, who knowingly participates in furthering action in court where the party knows or should know that the proceedings are not in compliance with the court rules, cannot later be heard to complain.

893 (1986), "As between a minor with a dissipated claim and an insurer which could have guarded against the danger of multiple payments, our choice is not a difficult one." Id. 378.

Because of the above, Plaintiff is entitled to enforce the settlement as approved in the July 28, 1997 Circuit Court hearing with payment being made to the minor child's duly appointed conservator.

4. THE 1997 DISMISSAL BY THE CIRCUIT COURT SHOULD BE SET ASIDE BY THIS COURT IN THE EXERCISE OF ITS GENERAL POWERS OF SUPERVISION PURSUANT TO MCR 7.316(A)(7) .

In establishing the Supreme Court of Michigan, the Michigan Constitution of 1963 provides specific direction to this Court to establish rules of practice and procedure which are to govern all courts of this state. (Const 1963, art 6 § 5).

In this case, several courts have already been requested to enforce the court rules which this Court has established. Although Circuit Judge Fred L. Borchard determined that the 1997 settlement could not stand in view of the clear and unequivocal requirements for reviewing and concluding settlements for minor children, the Michigan Court of Appeals in Bierlien I[7] and the Circuit Court in the present appeal declined to enforce those rules. A reading of their respective decisions would seem to indicate that there was an overriding concern that the Defendants ought not to pay a settlement twice. With that overriding concern in mind, these courts effectively chose to ignore the clear procedural requirements of MCR 2.420, which are intended for the protection of infant children. [8]

As has been previously briefed, the settlement procedures for a minor child are not

[7] The first appeal, Bierlein ex rel Bierlein v Schneider, 2004 WL 95185 (Mich Ct App 2004) was unpublished.
[8] Although MCR 2.420 is intended to protect children whose interests are being litigated, the rule secondarily also protects defendants who resolve claims either through settlement or judgment. If all procedural rules are followed, Defendants are protected from future claims brought by the minor after attaining the age of majority.

advisory or discretionary. They are clear and unequivocal. If the responsible parties (court and counsel included) deviate from the rules, they do so at their peril, not the minor child's. It is submitted that the present case justifies entry of an order, pursuant to MCR 7.316(a)(7), setting aside the order of dismissal. Although MCR 7.316 authorizes this Court to grant relief without remand to the Circuit Court, the determination of the amount which is due to the Plaintiff, including interest from the time of settlement approval, is better left to determination by the lower court. However, no further proceedings should be required to determine whether the Plaintiff minor is entitled to the benefit of the protection afforded by MCR 2.420.

In applying MCR 7.316, this Court has noted that "while this Court should and does give due regard to its own rules, the promulgation thereof cannot shackle the powers of this Court to do that which ought to be done if otherwise within the powers of the Court." St. John v Nichols, 331 Mich 148, 159; 49 NW2d 113 (1951). *See also* Guastello v Citizens Mutual Ins Co, 11 Mich App 120; 160 NW2d 725 (1968) ("The rules and practice of the Court being established by the Court, may be made to yield to circumstances to promote the ends of justice.")

Where, as here, the rights of an infant child have been violated because this Court's rules for settlement of the infant child's claim were not strictly adhered to, the problem needs to be addressed and mended. The error, committed on July 28, 1997 cannot be allowed to continue uncorrected.

V. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, based on the foregoing reasons, Plaintiffs-Appellants request that this Honorable Court set aside the Circuit Court Order of Dismissal dated November 15, 2001, and Order that the settlement entered on July 28, 1997 be enforced.

Dated: June 20, 2006.

Respectfully submitted,

SMITH BOVILL, P.C.

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